STATE OF MICHIGAN

COURT OF APPEALS

JOHN EDWARDS,

Plaintiff-Appellant,

v

17TH DISTRICT COURT and CHARTER TOWNSHIP OF REDFORD,

Defendants-Appellees,

and

JUDY TIMPNER, JASON BRUCE, and DAWN BRUCE,

Defendants.

UNPUBLISHED
July 31, 2007

No. 269664
Wayne Circuit Court
LC No. 04-411145-NO

JOHN EDWARDS,

Plaintiff-Appellee,

v

17TH DISTRICT COURT,

Defendant-Appellant,

and

CHARTER TOWNSHIP OF REDFORD,

Defendant.

No. 269873
Wayne Circuit Court
LC No. 04-411145-NO

Before: Donofrio, P.J., and Bandstra and Zahra, JJ.

PER CURIAM.

This is a same-gender sexual harassment, discrimination, and breach of contract case. In Docket No. 269664, plaintiff appeals as of right the trial court's order granting defendants'[1] motion for summary disposition pursuant to MCR 2.116(C)(10) of his claims of sexual harassment and sex discrimination in violation of the Michigan Civil Rights Act (CRA), MCL 37.2101 *et seq.*[2] Plaintiff also appeals as of right the trial court's order granting defendants' motion for summary disposition of his breach of contract claim. In Docket No. 269873, defendant, 17th District Court, appeals as of right the trial court's order denying defendants' motion for costs and attorneys' fees pursuant to MCR 2.405(D). In Docket No. 269664, we affirm the trial court's order granting defendants' summary disposition, and in Docket No. 269873, we reverse the trial court's order denying defendants' motion for costs and attorneys' fees.

I Standard of Review

We review a lower court's determination regarding a motion for summary disposition de novo. *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim based on the pleadings alone and should be granted only if the factual development of the claim could not justify recovery. *Beaudrie v Henderson*, 465 Mich 124, 129-130; 631 NW2d 308 (2001). A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 396-397; 605 NW2d 685 (1999). "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in [the] light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists." *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001). Summary disposition is appropriate only if there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. *MacDonald*, *supra* at 332.

II Docket No. 269664

We first note that plaintiff may not rely on many of his allegations of sexual harassment to establish his claims. The Michigan Supreme Court has ruled that incidents occurring before the limitations period may not be considered as part of a "continuing violation." *Garg v Macomb Co Community Mental Health Services*, 472 Mich 263, 266, 278-284; 696 NW2d 646 (2005), mod on other grounds 473 Mich 1205 (2005). The statute of limitations for claims filed under the CRA is three years. MCL 600.5805(10); *Garg*, *supra* at 284. Therefore, plaintiff's claims must be based on actions arising on or after April 14, 2001, three years before plaintiff filed his complaint. Because David Sudekum was fired in 1999, none of his actions can form the

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[1] We will refer to the 17th District Court and Charter Township of Redford as defendants throughout.

[2] We note that plaintiff did not file an action for wrongful termination based on sex discrimination.

basis of plaintiff's claims. Plaintiff also cannot establish his claims based on Don Lancaster's alleged harassment of him that occurred before April 14, 2001.

Pursuant to MCL 37.2202(1), section 202 of the CRA,

> An employer shall not do any of the following:
>
> (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.
>
> (b) Limit, segregate, or classify an employee or applicant for employment in a way that deprives or tends to deprive the employee or applicant of an employment opportunity, or otherwise adversely affects the status of an employee or applicant because of religion, race, color, national origin, age, sex, height, weight, or marital status.
>
> (c) Segregate, classify, or otherwise discriminate against a person on the basis of sex with respect to a term, condition, or privilege of employment, including, but not limited to, a benefit plan or system.

"The essence of a sex discrimination civil rights suit is that similarly situated persons have received disparate treatment because of their sex . . . . Sexual harassment is considered a subset of sex discrimination." *Diamond v Witherspoon*, 265 Mich App 673, 683; 696 NW2d 770 (2005). Plaintiff in this case raised disparate treatment claims based on defendants' alleged failure to investigate his complaints, and sexual harassment claims of sex discrimination.

A. Disparate Treatment

Disparate treatment may be proven by either direct or circumstantial evidence. *Sniecinski v Blue Cross & Blue Shield*, 469 Mich 124, 133; 666 NW2d 186 (2003). When a plaintiff relies on direct evidence of disparate treatment based on sex, the plaintiff may prove his or her case like any other civil case. *Id.* at 132. However, when a plaintiff relies on circumstantial evidence of disparate treatment, he or she must proceed under the burden-shifting approach of *McDonnell Douglas v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). *Sniecinski*, *supra* at 133.

To establish a prima facie case under *McDonnell Douglas*, a plaintiff must prove that: (1) he or she was a member of a protected class; (2) he or she suffered an adverse employment action; (3) he or she was qualified for the position for which he or she applied; and (4) the adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination. *Hazle v Ford Motor Co*, 464 Mich 456, 463; 628 NW2d 515 (2001). If a plaintiff establishes a prima facie case, "a presumption of discrimination arises." *Lytle v Malady (On Rehearing)*, 458 Mich 153, 173; 579 NW2d 906 (1998). Thereafter, the defendant bears the burden of articulating a legitimate, nondiscriminatory reason for its employment decision. *Hazle*, *supra* at 464. Once the defendant articulates such a reason, the plaintiff must present evidence that the articulated reason is mere pretext. *Id.* at 464-466.

In this case, plaintiff has presented no direct evidence of discrimination. Thus, we apply the *McDonnell Douglas* approach to his claim. Defendants' reaction to employee complaints did not give rise to an inference of unlawful discrimination and, therefore, do not "support the suspicion" that defendants discriminated against male employees. Plaintiff presented limited evidence regarding defendants' response to the complaints of other employees. Defendants investigated a complaint raised by Kate Cless against plaintiff in 1999, and a complaint lodged by Jason Bruce against plaintiff on October 31, 2003. Plaintiff presented no further evidence to reveal a trend of ignoring the complaints of male employees. Further, plaintiff has not established that defendants' failure to react was based on sex. Accordingly, we find that plaintiff failed to create a question of material fact regarding his claim of disparate treatment.

Moreover, defendants articulated "a legitimate, nondiscriminatory reason for its employment decision." *Hazle*, *supra* at 464. Plaintiff purposefully ignored Judge Kahil's directives and plaintiff testified that he commonly made notations on the docket sheet when he felt that Judge Khalil handled a case poorly or unfairly or was too aggressive on the bench. Plaintiff admitted that he kept notes in a personal calendar as evidence of Judith Timpner and Judge Khalil's "poor management," including a schedule of the judge's comings and goings. Plaintiff further admitted that he made negative comments to other district court employees about Judge Khalil. Plaintiff even admitted that he told other employees that he knew Judge Khalil's "dirty little secrets" and threatened to "take her down" if she attacked him first.

Judge Khalil also cited various incidents of plaintiff's conduct that supported her decision to terminate plaintiff's employment. At the October 31, 2003, union meeting at which Jason Bruce raised his complaint of sexual harassment against plaintiff, Bruce told the judge various things that plaintiff had said about her and about the notations in plaintiff's personal calendar. Judge Khalil testified that Terry Painter, an employee in the district court clerk's office, similarly told her in the summer of 2003 that plaintiff was making negative comments about the judge. Judge Khalil testified that she discussed plaintiff's attitude with him several times that summer and suggested that he find other employment if he was unhappy. Moreover, plaintiff allowed personal preoccupations to interfere with his work. Judge Khalil found boxes of unopened mail and unfiled court documents underneath plaintiff's desk and in a storage room in the basement.

Plaintiff failed to establish that Judge Khalil's alternative reasons for terminating his employment were mere pretext. Plaintiff contends that defendants' discriminatory intent was revealed by the timing of his termination, i.e., in time to deprive him of his right to medium term disability (MTD) benefits. However, the record shows that Judge Kahill had considered and discussed with others terminating plaintiff's employment long before his medical leave of absence. Thus, defendants presented sufficient corroboration that plaintiff's termination was not merely a guise to deprive him of his MTD benefits.

B. Sexual Harassment

Plaintiff also asserts that Lancaster and Bruce sexually harassed him within the three-year statute of limitations. Plaintiff alleges sexual harassment based on a variety of his co-workers' actions, ranging from comments ridiculing his perceived sexual orientation to allegations involving actual contact with sexual overtones. The CRA specifically defines sex discrimination based on sexual harassment as follows:

> Discrimination because of sex includes sexual harassment. Sexual harassment means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature under the following conditions:
>
> * * *
>
> (iii) The conduct or communication has the purpose or effect of substantially interfering with an individual's employment, public accommodations or public services, education, or housing, or creating an intimidating, hostile, or offensive employment, public accommodations, public services, educational, or housing environment. [MCL 37.2103(i).]

A plaintiff may establish a prima facie claim of a hostile work environment under MCL 37.2103(iii) by showing that:

> (1) the employee belonged to a protected group;
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> (2) the employee was subjected to communication or conduct on the basis of sex;
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> (3) the employee was subjected to unwelcome sexual conduct or communication;
>
> (4) the unwelcome sexual conduct or communication was intended to or in fact did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment; and
>
> (5) respondeat superior. [*Haynie v Dep't of State Police*, 468 Mich 302, 308; 664 NW2d 129 (2003), quoting *Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993).]

In *Barbour v Dep't of Social Services*, 198 Mich App 183, 185; 497 NW2d 216 (1993), this Court determined that neither the CRA nor the analogous provisions of title VII of the federal Civil Rights Act of 1964, 42 USC 2000e *et seq.*, were "intended to address discrimination and harassment due to a person's sexual orientation or perceived orientation." Accordingly, this Court held that the harassment must be "gender-based," not based on harassment based on the harasser's perception of plaintiff's sexual orientation. However, *Barbour* did allow the plaintiff to maintain a claim based on "specific homosexual advances directed to him by his supervisor." In doing so, *Barbour* cited *Wright v Methodist Youth Services, Inc*, 511 F Supp 307 (ND Ill, 1981), in which the plaintiff "allege[d] that during the course of his employment his supervisor . . . made overt homosexual advances towards [him] and that as a result of [his] resistance to those advances his employment was terminated." *Id*. at 308. Thus, consistent with *Oncale v Sundowner Offshore Services, Inc*, 523 US 75, 80; 118 S Ct 998; 140 L Ed 2d 201 (1998), *Barbour* can clearly be read to require plaintiffs provide "credible evidence that the harasser was homosexual." See *Mayville v Ford Motor Co*, unpublished opinion per curiam of the Court of Appeals, issued October 26, 2006 (Docket No. 267552), p 4; *Brewer v Hill*, unpublished opinion per curiam of the Court of Appeals, issued September 15, 2000 (Docket No. 208872), at p 4.

Here, as in *Barbour*, *supra* at 186, plaintiff admits that much of the harassment was intended to humiliate him for working in a nontraditional male role. Although plaintiff testified that he believed that Bruce made sexual advances toward him, there is no evidence that any of the harassers were homosexual. Therefore, plaintiff has failed to establish that he was subjected to harassment on the basis of sex.

We would also conclude that plaintiff fails to establish a hostile work environment claim based on same-sex harassment. *Oncale*, *supra*. There is no allegation that plaintiff's harassers acted out of sexual desire. Nor is there an allegation that there was general hostility toward men in the workplace. Finally, although plaintiff did claim that Judge Khalil did not take plaintiff's harassment complaint as seriously as Cless' complaint, there is no allegation in regard to how the alleged *harassers* treated members of both sexes in the workplace. Therefore, we affirm the trial court dismissal of plaintiff's same-gender hostile environment claim.

C. Breach of Contract

Plaintiff also contends that defendants breached his employment contract and denied him disability benefits when he filed for a medical leave of absence in the midst of an investigation of Bruce's complaint against plaintiff.

We review "questions involving the proper interpretation of a contract or the legal effect of a contractual clause" de novo. *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005). "The primary goal in interpreting contracts is to determine and enforce the parties' intent . . . . To do so, this Court reads the agreement as a whole and attempts to apply the plain language of the contract itself." *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 663 (2000) (internal citations omitted).

The benefit at issue in this case was provided for in the 17th District Court's Judicial Secretary's Handbook ("Handbook") issued on October 24, 1996. The relevant provision provided that:

> Appointees will be provided with medium term disability (MTD) insurance for 80% of their salary for up to two full years. Such benefit shall activate after an absence of 30 consecutive calendar days for an appointee's medical condition verified by a physician's written statement. Appointees may at their option delay going on MTD until they have exhausted their leave bank. Appointees may at their option use or not use their accrued leave days during part or all of the 30 day qualification period before receiving MTD benefits. Appointees on MTD will not accrue additional leave time.

Assuming the Handbook was "part of the agreement between the employer and the employee," the MTD provision clearly states that an employee must be absent for "30 consecutive calendar days" because of a "medical condition verified by a physician's written statement" to qualify for the benefit. Plaintiff was absent from November 2, 2003, until November 4, 2003, because he had been suspended with pay. Sesko testified that plaintiff was still eligible to receive the MTD benefit while he was on suspension. However, once plaintiff was terminated, he was no longer eligible for that benefit. Plaintiff was terminated effective November 14, 2003. Accordingly, his absence from work after that date was not caused by his

disability; it was caused by the fact that he was no longer employed by the 17th District Court. Viewing the evidence in plaintiff's favor, he was ineligible for benefits even if his termination occurred on December 1, 2003. Plaintiff's doctor placed him on disability leave beginning November 4, 2003. Plaintiff did not become eligible for MTD benefits until December 4, 2003. Because plaintiff was no longer employed by the 17th District Court on December 4, 2003, he was ineligible for the benefits.

Moreover, plaintiff had been informed in writing that he was going to be terminated effective November 14, 2003. The district court merely waited to send an official, written notification of termination to allow plaintiff to negotiate his resignation. Even though plaintiff knew his employment was being terminated, he submitted his request for medical leave on November 20, 2003, eight days after he was informed of his impending termination. Sesko characterized plaintiff's late notification of his "disability" as "desperately trying to hang onto his job" given that the 17th District Court had already investigated Bruce's sexual harassment claim and informed plaintiff that he was going to be terminated.

IV Docket No. 269873

The 17th District Court challenges the trial court's denial of defendants' motion for costs and attorney fees under MCR 2.405 following plaintiff's rejection of defendants' offer of judgment. We review a trial court's decision to award or deny costs for an abuse of discretion. *JC Building Corp II v Parkhurst Homes, Inc*, 217 Mich App 421, 426; 552 NW2d 466 (1996). We also review a trial court's application of the "interest of justice" exception of MCR 2.450(D)(3) to a particular set of facts for an abuse of discretion. *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 374; 689 NW2d 145 (2004). To the extent that this issue involves the interpretation of a court rule, our review is de novo. *Associated Builders & Contractors v Dep't of Consumer & Industry Services Director*, 472 Mich 117, 123-124; 693 NW2d 374 (2005).

MCR 2.405 provides for the imposition of costs and attorney fees following the rejection of an offer of judgment as follows:

> (D) Imposition of Costs Following Rejection of Offer. If an offer is rejected, costs are payable as follows:
>
> (1) If the adjusted verdict is more favorable to the offeror than the average offer, the offeree must pay to the offeror the offeror's actual costs incurred in the prosecution or defense of the action.
>
> * * *
>
> (3) The court shall determine the actual costs incurred. The court may, in the interest of justice, refuse to award an attorney fee under this rule.

The court rule defines the following relevant terms as follows:

> (3) "Average offer" means the sum of an offer and a counteroffer, divided by two. If no counteroffer is made, the offer shall be used as the average offer.

(4) "Verdict" includes,

* * *

(c) a judgment entered as a result of a ruling on a motion after rejection of the offer of judgment.

(5) "Adjusted verdict" means the verdict plus interest and costs from the filing of the complaint through the date of the offer. [MCR 2.405(A).]

"The purpose of MCR 2.405 is 'to encourage settlement and to deter protracted litigation.'" *Luidens v 63rd District Court*, 219 Mich App 24, 31-32; 555 NW2d 709 (1996).

The trial court's dismissal of plaintiff's breach of contract claim clearly amounted to a "verdict" under the court rule given that plaintiff had rejected defendants' offer of judgment. In this case, defendants offered plaintiff $4,500 in settlement of his breach of contract claim and plaintiff made a counteroffer of $50,000. Therefore, the "average offer" as defined in MCR 2.405(A)(3) was $27,250. Because the trial court dismissed plaintiff's breach of contract claim, the "adjusted verdict" was zero. Therefore, the adjusted verdict was more favorable to defendants than the average offer. MCR 2.405(D)(1).

We conclude that the trial court improperly rejected defendants' motion for actual costs in this case. The trial court "must" award actual costs when the conditions of MCR 2.405(D)(1) are met. "Must" is a mandatory term and the trial court lacked discretion to deny defendants' request. *Great Lakes Gas Transmission Ltd Partnership v Markel*, 226 Mich App 127, 130; 573 NW2d 61 (1997) (interpreting the use of the word "must" in MCR 2.403[O][1]). Therefore, pursuant to the mandatory language of the court rule, a trial court must order the rejecting party to pay the offeror's taxable costs "necessitated by the failure to stipulate to the entry of judgment." MCR 2.05(A)(6); *Derderian*, *supra* at 30. The "interest of justice" exception in MCR 2.405(D)(3) applies only to attorney fees and not to other costs incurred during litigation. *Derderian*, *supra* at 30. Accordingly, the trial court was not entitled to rely on that exception to deny defendants' request for costs.

Plaintiff also contends that defendants improperly submitted costs that are not included under the court rule. "Actual costs" are defined in MCR 2.405(A)(6) as "the costs and fees taxable in a civil action and a reasonable attorney fee for services necessitated by the failure to stipulate to the entry of judgment." Defendants requested "$571.34 to create exhibits for trial, $20.00 to file motions in limine prior to trial, and $20.00 to file this motion." The trial court could not award defendants $571.34 for the creation of trial exhibits. In relation to the identical definition of "actual costs" in MCR 2.403, this Court found that a party may not recover the costs of enlarging exhibits for trial because such a cost was not included in the taxable cost provisions of the Revised Judicature Act, MCL 600.2401 *et seq.* *Taylor v Anesthesia Assoc of Muskegon*, 179 Mich App 384, 387-388; 445 NW2d 525 (1989). The cost of preparing exhibits in the first instance is similarly not included in the act.

However, defendants were entitled to the $40 in motion filing fees and the trial court was required to award that amount. MCL 600.2441(2) provides for the reimbursement as taxable costs of $20 "[f]or the proceedings before trial," such as those costs related to defendants'

motions in limine, and $20 "[f]or motions that result in . . . judgment," such as the award of costs and attorney fees. Therefore, although the trial court improperly denied defendants' motion for costs following its dismissal of plaintiff's breach of contract claim, defendants are entitled to only $40 of those costs requested. Without a description of the remaining $1,900 in alleged costs, we are unable to determine if defendants were entitled to that amount.

We also conclude that the trial court improperly denied defendants' motion for attorneys' fees. The "interest of justice" exception to the award of attorneys' fees is "an exception to a general rule." *Luidens, supra*. Therefore, the trial court should award attorneys' fees "'absent unusual circumstances'" lest the court "'render the rule ineffective.'" *Id.* at 32, quoting *Butzer v Camelot Hall Convalescent Ctr, Inc (After Remand)*, 201 Mich App 275, 278-279; 505 NW2d 862 (1993), and *Gudewicz v Matt's Catering, Inc*, 188 Mich App 639, 645; 470 NW2d 654 (1991). When a trial court decides not to award attorney fees as requested under MCR 2.405, it "'must articulate why the "interest of justice" will be served in light of the role that MCR 2.405 was designed to serve in the administration of our judicial process . . . .'" *Luidens, supra*, quoting *Hamilton, supra* at 597.

In *Luidens, supra* at 33, this Court described the application of the "interest of justice" exception as follows:

> We believe that the exceptional nature of the "interest of justice" provision, the settlement-encouraging purpose of MCR 2.405, and these precedents of the Court set the broad parameters of the exception. Attempts to give meaning to the term "interest of justice" must fit within these parameters. We are mindful that this term is susceptible to broad readings that would consume the general rule of awarding fees and nullify MCR 2.405's purpose of encouraging settlement. The term "is not the equivalent of a legal Rorschach test on to which each jurist may project his or her individualized notion of justice." *Hamilton*[, *supra* at] 596. On the other hand, it would be inappropriate to read the term so narrowly that the exception itself would be effectively nullified.

Following the July 25, 2005, case evaluation hearing in this case, a panel of case evaluators issued a non-unanimous case evaluation award in plaintiff's favor for $4,500. On November 29, 2007, the trial court adjourned the November 30, 2005 trial date to January 24, 2006, apparently for "docket control reasons." On December 7, 2005, defendants presented plaintiff with an offer of judgment in the amount of $4,500.[3] Plaintiff rejected that offer and made a counteroffer of $50,000, which defendants did not accept. The trial court, on January 24, 2006, reconsidered and granted defendants' previous motion for summary disposition of plaintiff's contract claim. Defendants requested attorneys' fees under MCR 2.405, but the trial court denied the motion, stating "unusual circumstances" arose,

[3] This offer expressly related only to plaintiff's breach of contract claim for MTD benefits because the sexual harassment and sex discrimination claims had earlier been dismissed.

> because of the way the case evolved, some of the factual history that occurred with regard to the first trial date and the second trial date and an offer of judgment being made in between those two dates, I've decided that I am going to deny the motion . . .

We conclude that the trial court erred in denying defendants' motion. The trial court did not articulate how the "interest of justice" will be served by denying the request. Further, the trial court's reference to the timing of the offer in relation to the scheduled trial date does not reveal an "unusual circumstance." MCR 2.405(B) provides that:

> (B) Offer. Until 28 days before trial, a party may serve on the adverse party a written offer to stipulate to the entry of a judgment for the whole or part of the claim, including interest and costs then accrued.

Here, the offer was made more than 28 days from trial, consistent with MCR 2.405(B). MCR 2.405(B) does not prevent offers of judgment from being made if the trial date is adjourned. Therefore, we reverse the trial court's order denying defendants' motion for costs and attorneys' fees, and remand for further proceedings consistent with this opinion.

IV Conclusion

In Docket No. 269664, we affirm. In Docket No. 269873, we reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Pat. M. Donofrio
/s/ Richard A. Bandstra
/s/ Brian K. Zahra